S. HRG. 98-97

NOMINATIONS—CPSC AND DOT

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

NOMINATIONS

MARCH 16, 1983

TERRENCE M. SCANLON, TO BE A COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

APRIL 21, 1983

JAMES HORACE BURNLEY IV, TO BE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

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NOMINATION—CONSUMER PRODUCT SAFETY COMMISSION

WEDNESDAY, MARCH 16, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:07 a.m., in room SR-253, Russell Senate Office Building, Hon Robert W. Kasten, Jr., presiding.

Staff members assigned to this hearing: Marguerite Ayers, professional staff member and Loretta Dunn, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Good morning. This morning the Committee on Commerce, Science, and Transportation is considering the nomination of Terrence Scanlon for Commissioner of the Consumer Product Safety Commission (CPSC). The President has nominated Mr. Scanlon to complete the balance of a 7-year term that began October 27, 1982, and expires October 26, 1989.

Mr. Scanlon is currently the Chief of the Industry and Technology Division of the Minority Business Development Agency at the Department of Commerce. He has worked at the Commerce Department's International Trade Administration and before that at the Small Business Administration.

Senator Hollings has submitted an opening statement for the record and that will be inserted at this piont.

[The statement follows:]

OPENING STATEMENT BY SENATOR HOLLINGS

This morning we consider the nomination of Terrence Scanlon to the Consumer Product Safety Commission. This Committee recently held a hearing on reauthorization of the CPSC. At that hearing a number of issues were discussed including the independence of the agency, the President's proposed budget of $32 million, and disclosure of information under section 6(b) of the Consumer Product Safety Act. I urge Mr. Scanlon to give his immediate attention to these issues which are of vital importance to all who care about the safety of consumer products and the mission of the CPSC.

I believe in an independent Consumer Product Safety Commission. I will oppose efforts by the administration or others to abolish the agency and transfer its functions to an executive branch department. It is important that the basic mission of the agency is not subject to the whims of a particular administration, and that the Commission operate in the public interest to protect the health and safety of all Americans.

Further, I support a healthy budget for the Commission and will oppose efforts to weaken the agency by reducing its level of funding below the level needed to enforce its statutes.

I look forward to hearing Mr. Scanlon's answers today to questions concerning these issues.

Senator KASTEN. Mr. Scanlon has submitted answers to questions directed to him by the Committee along with his biographical sketch and both those will be made a part of the record.

[The information follows:]

BIOGRAPHICAL SKETCH OF TERRENCE M. SCANLON

Residence: 4510 Dexter Street NW., Washington, D.C. 20007.

Office: Minority Business Development Agency, U.S. Department of Commerce, Washington, D.C. 20230.

Born: May 1, 1939 in Milwaukee, Wisconsin.

Married to Judy Ball Scanlon.

Children: Michael Mansfield Scanlon, age 10, Justin Ball Scanlon, age 9, Brendan Hayes Scanlon, age 4.

Education: The Capitol Page School—1955-57, Graduated in 1957. Served as Page to House Majority Leader John W. McCormack. B.S. Economics, Villanova University School of Commerce and Finance, graduated in 1961.

EMPLOYMENT EXPERIENCE

Minority Business Development Agency (MBDA), U.S. Department of Commerce. Chief, Industry and Technology Division, 1981 to present.

International Trade Administration, U.S. Department of Commerce, March to August 1980 and January to May 1981.

Served as the U.S. Commerce Department Loaned Executive to the Combined Federal Campaign (August-November 1980).

Minority Business Development Agency (MBDA) (formerly the Office of Minority Business Enterprise) 1969 to 1980.

Small Business Administration (SBA), 1967-1969.

Served as SBA Congressional Liaison Representative to Capitol Hill, 1966 to 1967.

The White House, 1963-1966.

POLITICAL AFFILIATION AND ACTIVITIES

I have been a registered Democrat in the District of Columbia since reaching voting age.

PREHEARING QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. What do you consider to be the future mission of the Consumer Product Safety Commission? Please define the relationship between this mission and the role of industry in the area of consumer product safety.

Answer. The need as always is to provide for the public's protection against unreasonable risk of injury associated with consumer products. This mission necessitates a clear and precise identification of the greatest and most potentially threatening risks in the marketplace.

An obvious need exists therefore not only to identify and target current potential risks, but to develop the ability as well as to foresee and anticipate such additional risks before injuries, or even deaths, occur.

An efficient and responsive Commission is the cornerstone of such a policy. The Commission in cooperation with consumers, consumer groups and industry can develop the necessary mechanisms to spot, prevent and anticipate the greatest potential hazards to the public in consumer products. Such cooperation within the realm of what is both technologically possible and economically feasible can ensure that in the future a spirit of cooperation can provide for the common good of all concerned.

Question 2. If confirmed, what would be your basic objectives as a member of the Consumer Product Safety Commission?

Answer. My overall objective will be to protect the public against unreasonable risk of injury associated with consumer products. Initially I plan to review the information collection and dissemination procedures, to review existing relationships and information linkages between CPSC and state and local entities, to study the impact of rule making on small and medium-sized businesses and the impact of standards upon the competitive environment.

Question 3. What criteria have you established for selecting your personal staff at the Commission?

Answer. I will choose a staff that is competent, hardworking, possessed of common sense and a commitment to the public good. Inasmuch as I am not an attorney, at least one staff member will be an attorney. I will insist upon having personal staff members who can work well with what I understand to be a highly competent and professional career Commission staff.

Question 4. Do you believe that the issuance of safety standards which would require the development of new technology is an appropriate technique to advance the state of the art of consumer product safety technology?

Answer. The function of the Commission is to protect the public against unreasonable risk of injury associated with consumer products. For this reason we have an obligation—through the imposition of voluntary standards or if necessary, mandatory standards—to safeguard the public from products which pose such risks. It is far from clear, however, that this Commission—or any commission—can mandate the development of new technology. While it can prevent unsafe products from reaching the market, it cannot force the production of technology not yet scheduled. What mandates the introduction of new technology is not Commission fiat but a healthy, competitive marketplace in which the consumer is the final arbiter. Through its public awareness programs, the Commission can help to ensure that consumers are well informed about the safety of various products. While the Commission can never forget its obligation to prevent the marketing of products carrying an unreasonable threat to the public safety, overall and primarily a free competitive economy can product the safe new technology which an educated public demands.

Question 5. What do you believe to be the successes of the Consumer Product Safety Commission during its existence?

Answer. The major success of the Consumer Product Safety Commission has been the reduction of injuries. A primary example of this success is in the administration of the Poison Prevention Packaging Act where there has been a demonstrable reduction in deaths caused by poisoning. Other Commission successes include the establishment of annual priority objectives, the recent emphases on working with industry to secure voluntary standards, where necessary, and the Commission's ongoing educational and public awareness efforts.

Question 6. What do you see as the Commission's most significant shortcomings during its existence? What changes would you favor to overcome these shortcomings?

Answer. In its early years the Commission probably erred too often in trying to impose mandatory standards as the solution to various problems. In general the ideal solution to any consumer safety issue is a voluntary standard adopted by the Commission and industry with consumer input. The Commission's history makes clear that it can work closely and effectively with industry to protect the American people. If at all possible, this should be the approach taken by the Commission.

During the Commission's early years it did not adequately target its priorities or allocate its resources. In recent years the Commission has begun to do a much better job of planning, budgeting and targeting. I would hope to continue this trend.

Question 7. Do you believe that the Consumer Product Safety Commission should remain an independent regulatory agency or should the agency be incorporated within one of the executive departments?

Answer. Based on what I know today, I see no reason to change the CPSC's status as in independent regulatory agency.

Question 8. Do you believe that the Consumer Product Safety Commission should continue as a five member Commission? Would you support or oppose the reorganization of the Commission into an agency directed by a single administrator?

Answer. Not having been a member of the Commission, and not having participated in its deliberations, I cannot provide a definitive answer at this time. My inclination, though, is to say that the Commission has functioned well throughout its relatively short life; the public safety has been protected. I see no reason to put all authority in the hands of a single administrator. I think the present system, in which five members assisted by a skilled professional staff, and drawn from different political parties and differing viewpoints, has worked well. I see no present reason to change the structure.

Question 9. Do you believe that the Commission's priority setting mechanisms are adequate? If not, what do you believe would be a more effective means for establishing Commission priorities?

Answer. Again I must note that I have not served on the Commission or its staff, so I am unable to provide a definitive answer. The key question is how the Commis-

sion arrives at its priorities. In my view the Commission should consider the utilization of cost/benefits analysis to identify major hazards to the public, the economic impact of injuries and an analysis of available Commission resources that provides the greatest benefit to the public.

Question 10. In 1981 the Committee voted to emphasize the use of voluntary standards over the application of mandatory standards. What are your views regarding voluntary and mandatory standards?

Answer. As I indicated in answering an earlier question, voluntary standards are preferable to mandatory ones. They can be adopted far more quickly, require less staff time and do not result in costly and time consuming litigation. They are often accepted willingly and the consumer can only benefit. Inevitably there will be situations in which the Commission and industry cannot agree. In those cases—and I would hope them to be rare—the Commission must be prepared to protect the public safety through the imposition of mandatory standards.

Question 11. How do you visualize the relationship between the Consumer Product Safety Commission and state and local authorities?

Answer. The Commission should work closely with state and local authorities. There should be as few jurisdictional disputes as possible. Whether we are working at the local, state or national level, our objectives are the same—the protection of the public from unreasonable risks associated with the use of consumer products. The Commission should assist local and state units of government whenever possible. At the same time it should, of course, avail itself of their findings and encourage a mutual sharing of information, especially in research.

Question 12. What percentage of the Commission's budget do you believe should be allocated to education rather than standard setting activity?

Answer. Not having served on the Commission I cannot suggest now the exact ratio between spending for consumer education and standard setting. Both are important and the Commission has an obligation to provide both. Without committing myself to a final position, my inclination would be to oppose increased funding for information and education if that meant cutting the actual research or standards development budget.

Question 13. What types of consumer education programs do you believe are most effective?

Answer. I believe that those programs that target a specific act that the Commission hopes the consumer will take to provide for his or her individual safety are more effective than trying to change overall behavior patterns. I believe the smoke detector campaign is an example of an effective educational program.

Question 14. What steps will you take to preserve your independence from political and industry pressures? What provisions in the Consumer Product Safety Act do you see as designed to preserve your independence from such pressure?

Answer. I would feel a sense of independence regarding external pressures having the advantage of an appointive seven year term. The Commission, being an independent body, lessens the opportunity for these pressures. Most provisions of section 4 and sections 27(k) (1) and (2) of the Consumer Product Safety Act are designed to assure a Commissioner's independence.

Question 15. The primary issue in this year's reauthorization is the disclosure of product hazard information. Business interests support the present law (Section 6(b) of the Consumer Product Safety Act), but believe that the agency is attempting to circumvent the law in the proposed regulation. Consumer groups advocate reducing the restrictions on the agency's disclosure of product hazard information. What are your views on this issue?

Answer. According to the CPSC more than 2,500 consumer complaints are received annually at the agency, with an additional 10,000 Freedom of Information (FOIA) request received as well. No one would deny that this is a tremendous administrative burden for this relatively small regulatory agency.

Granted not all of these complaints, or FOIA inquires, involve the naming or identity of manufacturers or private labelers, thereby requiring 6(b) compliance. If only ¼ or so of such requests do involved 6(b) disclosure action, the challenge to balance the public's need to know and the potential for premature and unreasonable release of erroneous information affecting manufacturers or private labelers is an enormous task.

Few federally regulatory agencies have the potential, as does the CPSC, to severely damage business, especially small business, with the disclosure of inaccurate or erroneous information concerning a product's safety. I feel a need to move cautiously and prudently in this whole area.

I believe it will be necessary for a thorough and complete review of the administrative burdens and management problems the CPSC is faced with in this sensitive

area, which I pledge to do and at the same time weigh carefully the mandate that such disclosures, whether affirmative by CPSC or under FOIA, also be accurate and fair to all concerned. To this task I bring my substantial managerial experience in government service and with the small business community as well. I intend to follow carefully and to participate actively in the ongoing review of the 6(b) disclosure problems both in Congress and at the CPSC.

Question 16. The Commission has requested reauthorization for a five year period. In the past the agency has been authorized for three year periods, but never for five years, What is your position on this issue?

Answer. I know that some Members of Congress favor a five-year authorization and that some industry representatives prefer a two-year authorization. I will discuss with current and former members of the Commission and the staff to determine how the traditional three-year authorizations have worked in the past. I will, of course, consider the positions of Congressional experts as well as industry and consumer representatives before coming to a conclusion. Ultimately such a final determination is for Congress to make; however, the longer the authorization, obviously, the more stable and steady a course the Commission can pursue.

Senator KASTEN. Senator Goldwater, do you have an opening statement?

Senator GOLDWATER. I just came to be with my good friend from Commerce.

Senator KASTEN. I understand that our distinguished colleague and friend, Senator Inouye, from Hawaii has asked to speak on behalf of Mr. Scanlon. Senator Inouye, we are pleased to have you here today to make a statement and an introduction of Mr. Scanlon.

Senator Inouye.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. Thank you very much, Mr. Chairman.

Mr. Chairman, it is my honor and privilege today to introduce to you the Democratic nominee for Commissioner of the Consumer Product Safety Commission, my good friend Mr. Terrence Scanlon of the District of Columbia.

Since Terry does not have a home State Senator to introduce him to members of this distinguished committee, I, as an old friend of both he and his uncle—the former Senate Majority Leader Mike Mansfield—am both delighted and privileged to appear with the excellent nominee this morning.

Mr. Scanlon is a highly qualified professional and competent individual who is well suited for this key position of public service. Mr. Scanlon, who holds a degree in economics from Villanova University, is currently Chief of the Industry and Technology Division of the Commerce Department's Minority Business Development Agency and has been with the Commerce Department in various capacities for 14 years.

He brings both an educational as well as a practical background to this job and is confident of his qualifications for such an important independent agency. In this day of reduced Government spending for such essential agencies as the Consumer Product Safety Commission, Mr. Scanlon's practical experience and years of Government service will serve him and this Nation with his ability to marshall the reduced resources available to protect our Nation's consumers from defective and dangerous products in the marketplace.

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We all know that in such times a commonsense approach to using the limited resources of such an agency to accomplish maximum protection of the consumer is a vital and essential job which this committee fully appreciates and understands.

Mr. Chairman and members of the committee, it is my privilege now to introduce to you the nominee, Mr. Terrence Scanlon. He has my full support and I urge this committee to examine his record and experience carefully and I respectfully urge a favorable recommendation.

Thank you, Mr. Chairman.

Senator KASTEN. Senator Inouye, thank you very much.

Mr. Scanlon, it is my understanding that you have a statement which we would like for you to give at this time.

STATEMENT OF TERRENCE M. SCANLON

Mr. SCANLON. Thank you, Mr. Chairman. Senator Inouye, I thank you for those very kind remarks. They are indeed appreciated.

Senator Goldwater and other members of the committee, my name is Terrence Scanlon. I am honored to appear before you as the nominee of President Reagan to be a member of the Consumer Product Safety Commission.

Mr. Chairman, I believe that my education, personal experience, professional accomplishments, and civic involvement equip me to perform the high public trust for which you are evaluating my qualifications. Perhaps the greatest qualification of any Commissioner is a soundness and maturity of judgment in fulfilling the Commission's mandate to protect the public against unreasonable risks of injury associated with consumer products.

The consequences of CPSC decisions may literally be of a life and death nature for individual consumers exposed to dangerous products. At the same time, a Commission mistake could have devastating effects on small manufacturers, the object of much of its regulation.

The role of a Commissioner, as I view it, is to bring a commitment to consumer safety, sound judgment, and a reasonable understanding of the regulatory process and its effect upon both its intended beneficiaries and those subject to its regulation.

From childhood I have been steeped in a tradition of public service. During my teens I served as a page in the U.S. Congress. My father is a retired Foreign Service officer who spent countless hours inculcating in me a sense of civic obligation. I received similar encouragement from my uncle, Mike Mansfield, who served as Senator from Montana and is currently Ambassador to Japan.

During my twenties, I served on the White House staff of Presidents John Kennedy and Lyndon Johnson. Since then, I have been a civil servant, first in the U.S. Small Business Administration and, for nearly the past 14 years, in the U.S. Department of Commerce.

I have spent most of my professional career in the minority business development effort. This experience has given me sensitivity for the voiceless and politically unorganized who are in some sense

analogous to the individual consumer, the intended beneficiary of Consumer Product Safety Commission actions.

My close contact for the past decade and a half with numerous small businesses, many of them manufacturers, has provided me with a detailed understanding of the problems small businesses have in complying with Government regulations. My service in minority business development involved spearheading the formation in the early 1970's of a national network of business resource centers, matching talents of corporate support for extensive minority procurement efforts and providing technology commercialization assistance to minority owned firms.

In these efforts, I have worked with a wide range of private sector organizations to achieve a shared public objective. I have learned that voluntary standards obtained through cooperation with trade associations and other business groups can often be a much more effective route than regulation in securing broad protection of the public. I would hope that my experience could aid the Commission in using such approaches to enhance the protection it can provide through the regulatory process.

In addition to my Government service, I have served for the past 6 years as a member of the Catholic School Board for the Archdiocese of Washington. Until last year, I served as president of this school board, which sets educational policy for 36,000 children. This experience has provided me knowledge both in managing a sizable public service institution and in being responsive to the concerns of students, parents, and teachers, who are the ultimate consumers of educational services.

I also recognize the importance of an independent regulatory commission's fulfilling the mandate assigned it by Congress. Along with mature judgment, I would hope to bring to the Commission a strong sense of independence, a commitment to view individual cases on their merits, and an ability to work closely with what I understand to be a very able staff.

Ultimately, the success of such a regulatory agency is in large part dependent on the appointed Commissioners' abilities to motivate the professional staff, which has a diverse range of technical expertise. Throughout both my career in the civil service and on the school board of the Washington Archdiocese, I have had considerable success in motivating those I have supervised to exert themselve to the utmost. If given the opportunity, I pledge to work to enhance the effectiveness of the Commission staff.

If the Senate of the United States, after evaluating my qualifications, sees fit to confirm my nomination, I pledge to you that I will do my best to fulfill this trust by working vigorously and fairly to insure the safety of products in the marketplace.

I would be happy to answer any questions that you might have.

Senator KASTEN. Mr. Scanlon, thank you very much. How do you perceive your role at the Consumer Product Safety Commission?

Mr. SCANLON. I think my ultimate objective would to insure the safety of the American public. I think I would bring to bear a moderate approach.

I have had the opportunity of working in small business development for some 15 years, so not only would I be very sensitive to

securing safety in the marketplace, I would also be very aware of Government regulation and its impact on businesses.

Senator KASTEN. What do you hope to accomplish in the next couple of years? Rather, let me ask that in a different way. Would you list for the committee what you believe to be the top two or three priority actions at the Commission?

Mr. SCANLON. Obviously, the objective would be to fulfill the mandates of the five statutes which the Commission oversees. My personal objective, Senator, would be to look at the information dissemination process and see what I might do with my broad Government experience to improve it. This would also include the information collection process.

Second, I would want to enhance the relationships with State and local governments, particularly in sharing information, especially in research. These would be my two main objectives.

Senator KASTEN. When you talk about information, are you familiar with that information reporting system that they have at hospitals?

Mr. SCANLON. NEISS?

Senator KASTEN. The NEISS system?

Mr. SCANLON. Yes, I am.

Senator KASTEN. Is this the kind of thing you would like to concentrate on?

Mr. SCANLON. Yes, it is.

Senator KASTEN. You mentioned briefly the standards question, but let me ask specifically. Considering the CPSC's success over the last couple of years in cooperating with industry to develop voluntary standards, do you believe there is a necessity for the agency to have the authority to impose mandatory standards?

Mr. SCANLON. Yes. I do believe mandatory standards have to be. My philosophy would be, though, to work with trade associations, industries, and private labelers in obtaining voluntary standards. Only if a voluntary method did not work would I go the mandatory route.

Senator KASTEN. I was going to ask you in what kinds of situations would you support the imposition of mandatory standards. You answered that question in part, but could you develop your answer a little bit further? In what situations would you support mandatory standards?

Mr. SCANLON. If the voluntary efforts after a period of time bore no fruit, I would then go the mandatory route, but I would try everything in my own power to obtain industry cooperation. I think you can do a lot more in a voluntary way.

It is certainly less time-consuming, less costly. There is less litigation. There are a myriad of reasons that justify the preference for voluntary standards.

Senator KASTEN. Senator Goldwater, do you have questions of Mr. Scanlon?

Senator GOLDWATER. I have no questions. Any person who is a relative of Mike Mansfield is all right with me.

Mr. SCANLON. Thank you, Senator.

Senator GOLDWATER. The fact that he worked as a retailer makes it even better.

Mr. SCANLON. Thank you, Senator.

Senator GOLDWATER. I would move that we report him favorably to the Senate.

Senator KASTEN. There is a possibility we may be able to do this later this morning.

Senator Inouye, did you want to trade hats from an introducer to a member of the committee, or do you have questions?

Senator INOUYE. I want to second the motion made by my distinguished colleague.

Senator KASTEN. The motion has been made and seconded. I am not sure that it is acceptable right now, but we can do it later today.

Senator INOUYE. A quorum is present unless challenged, right?

Senator KASTEN. Mr. Scanlon, you have been employed by the Federal Government since 1963. Senator Goldwater briefly mentioned your retail background, but, other than that, do you think that in lacking specific experience in the private sector, you will be able to understand and appreciate the problems and the realities of business and industry in the private sector?

Mr. SCANLON. Yes, I will. The bulk of my work experience, some 15 years, has been in business development and most of that with small and medium-sized socially and economically disadvantaged businesses, so I think I will bring a real sensitivity in that area.

Senator KASTEN. I have no further questions. As I mentioned in my opening statement, we have already reviewed your responses to a number of more detailed questions which the committee submitted to you earlier.

I would like to say that I, too, enthusiastically support your nomination. I also believe that it will be favorably reported by the committee and by the Senate and I am hopeful that we can do it at the quickest possible time.

I will discuss with Senator Packwood, the chairman of the full committee, the possibility of voting this nomination out as quickly as possible so that it can come before us on the Senate floor and you, as a Commissioner of the Consumer Product Safety Commission, can proceed to work and deal with the important issues that are before you.

I would like to thank you very much for your testimony here this morning and we look forward, as a committee, and I look forward personally, to working with you. Thank you very much.

Mr. SCANLON. Thank you, Mr. Chairman. Thank you, Senator Inouye.

Senator KASTEN. The hearing is adjourned.

[Whereupon, at 9:22 o'clock a.m., the committee adjourned, to reconvene upon the call of the Chair.]

NOMINATION—DEPARTMENT OF TRANSPORTATION

THURSDAY, APRIL 21, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:07 a.m., in room SR-253, Russell Senate Office Building, Hon. John C. Danforth, presiding.

Staff members assigned to this hearing: Marguerite Ayers, professional staff member and Steve Palmer, minority professional staff member.

Senator DANFORTH. We are happy to have Mr. Jim Burnley with us, who has been nominated for the position of General Counsel of the Department of Transportation.

We have your biographical sketch and the prehearing questions and answers which we will place in the record at this point.

[The information follows:]

BIOGRAPHICAL SKETCH OF JAMES HORACE BURNLEY IV

Address: 6605 Rosecroft Place, Falls Church, VA 22043.
Date and place of birth: July 30, 1948, High Point, North Carolina.
Martial status: Married to Jane Nady Burnley.
Name and ages of children: Jay Burnley, Age 11.
Education: Yale University, 1966–1970, B.A., Harvard Law School, 1970–1973, J.D.

EMPLOYMENT RECORD

U.S. Department of Transportation, Special Assistant to the Secretary, March 1983 to Present.

U.S. Department of Justice, Associate Deputy Attorney General/Special Assistant to the Deputy Attorney General, March 1981 to April 1982.

Turner, Enochs, Foster, Sparrow & Burnley, P.A. (and predecessor firms), Greensboro, N.C., Shareholder and Vice-President, 1975–1981.

Brooks, Pierce, McLendon, Humphrey & Leonard, Greensboro, N.C., Associate Attorney, 1973–1975.

Brooks, Pierce, McLendon, Humphrey & Leonard, Greensboro, N.C., Summer Law Clerk, 1973, 1974.

Political affiliations and activities: Republican.

PREHEARING QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

QUALIFICATIONS TO BE GENERAL COUNSEL

Question. Your background indicates little experience in the area of transportation. What do you believe makes you qualified for the position of General Counsel? Are there any issues within the field of transportation which you would like to establish as high priorities for legislation or analysis by the General Counsel's office.

Answer. I believe that my broad legal experience will be of substantial assistance in the execution of the Secretary's priorities and the ongoing programs of the De-

partment of Transportation. I was in private practice for eight years prior to government service, and I dealt with a wide range of matters that are comparable to the issues involving the Department and the public, such as complex antitrust litigation. In the federal government, I have worked as the Director of VISTA and as Associate Deputy Attorney General. Both of these jobs provided a solid grounding in the techniques of implementing federal programs, from authorizations and appropriations through enforcement of regulations.

As I see the job, the legislative and analytical priorities of the General Counsel will be those of the Secretary. She has already set out the following important issues: further deregulating surface transportation, particularly trucking; implementing the Surface Transportation Assistance Act of 1982; transferring Conrail to the private sector; rebuilding the air control system; and maritime regulatory reform. Of course, some matters are inherently legal in nature, such as representing the Department in air traffic controller litigation and the transfer of remaining Civil Aeronautics Board functions to the Department.

EFFECT OF DEREGULATION ON TRANSPORTATION SERVICE

Question. Over the past several years, Congress has passed reform legislation reducing the economic regulation of the airline, trucking, rail and bus industries. Concerns have been raised about the effect of this legislation on both the carriers and users of transportation service. How would you assess the impact of this legislation on the transportation sector? Have certain segments been disadvantaged to the extent that further legislation might be necessary?

Answer. Carriers, shippers, passengers, and the consuming public have benefited from deregulation. Rates, fares and service are increasingly based on competitive factors, not on artificial regulatory pricing and entry constraints. Shippers, passengers and other consumers will benefit from more competitive prices and from service designed to meet their transportation needs.

While I do not believe that major legislation is needed to protect "disadvantaged" segments of the transportation sector, implementation of deregulation plans requires sensitivity to the transitional problems in moving from a protected and highly regulated environment to competitive free markets. With a few legitimate exceptions such as the international maritime trade, vigorous antitrust enforcement is needed in previously regulated sectors to ensure that genuine competition occurs.

ANTITRUST IMMUNITY FOR THE TRANSPORTATION INDUSTRY

Question. With economic regulation of the transportation industry being decreased, questions have been raised about the role of antitrust laws in protecting consumers and shippers from monopolies and other carriers from predatory pricing. To what extent should the transportation industry be covered by antitrust laws? What initiatives would you take in this area if confirmed as General Counsel of the Department of Transportation?

Answer. As stated in my preceding answer, unless there are strong public policy justifications that warrant antitrust immunity for certain carrier actions, I believe that the antitrust laws should apply. One example of where immunity is warranted is in international shipping where domestic carriers need some form of immunity to compete fairly with foreign carriers who have similar immunity.

Therefore, I will work to see that the Department's presentations of its views in regulatory proceedings before the ICC, CAB, FMC and other administrative agencies include the need for application of basic antitrust principles as deregulation moves forward. I will also encourage efforts to study methods of enhancing competition among transportation modes.

DEPARTMENT ROLE IN RAIL MATTERS

Question. In the last few years, the administration has sought to curtail Federal involvement in various transportation programs, particularly by reducing funding levels of programs affecting the rail industry. How would you assess the Department's role in the rail area? Are there matters in which you believe the Department should become more or less involved?

Answer. Before offering a comprehensive answer, I will need to become more familiar with the details of the Department's many rail activities. Clearly, there is a continuing important federal role in assuring safety on the nation's railroads. Also, we are responsible for monitoring the financial health of the railroads on a continuing basis, to guard against a recurrence of the financial collapses and threats to service that occurred in the Northeast and Midwest during the 1970's.

There are areas where the federal role should be reduced or eliminated. The decision to return Conrail to the private sector is an outstanding example of removing the federal government from an inappropriate role. Conrail Chairman Stanley Crane now has the flexibility to run the railroad on a business-like basis and to achieve profitable status. Conrail has been relieved of commuter service, which is better handled by local commuter authorities who must pay for the service. Labor has made valuable concessions to Conrail which were needed to put the carrier on a profitable basis. The Staggers Act and selected line abandonments have permitted Conrail to tailor its service to improve revenues substantially. The remaining federal role should be to work with the investment banker, Goldman Sachs and Company, to develop a plan that will return ownership of Conrail to the private sector.

Financial assistance programs, both for rehabilitation of high density lines and for local rail service, have served their purpose and stabilized service where it is needed. There does not appear to be a continuing need for federal activity in this area.

Transfer of the Alaska Railroad from federal to state hands should occur under the statutory schedule. Like the state's airports and highways, the railroad is clearly more a state rather than federal concern.

The federal government does have a role in assuring a viable national passenger rail system. But we must try to minimize the general tax revenues used to subsidize the system, and strive to meet or exceed the 50 percent cost-recovery goal set by the 1981 Amtrak law. For additional routes beyond the national system, I support the Administration's pending legislation to recover all avoidable operating costs, so as to prevent placing unfair burdens on federal taxpayers. The Northeast Corridor Improvement Project should be turned over to Amtrak on schedule.

COAST GUARD ROLE

Question. You have stated that as Associate Deputy Attorney General at the Department of Justice you were involved in planning the implementation of some aspects of the President's national program to combat organized crime engaged in drug smuggling. One of the agencies involved in drug interdiction has been the Coast Guard. What is your position on the Coast Guard's role in drug interdiction and the need to provide adequate levels of funding to support the mission?

Answer. The Coast Guard has an active program under way to continue maritime drug interdiction and improve its capabilities. This improvement will include procurement of new vessels, additional aircraft, shore support and surveillance equipment.

The Coast Guard will continue to function as an active part of the South Florida Task Force, and will also participate in the regional task forces recently authorized by the President and now being established by the Attorney General. These Task Forces will integrate the resources of the Departments of Justice, Transportation and Treasury and are designed to stop the drug trade wherever it is found in the nation.

I am fully committed to support the President's program to curtail and eliminate the drug trade and the Coast Guard will continue to be a major actor in the effort. Secretary Dole has indicated to this Committee that she will recommend funding for the Coast Guard at levels to allow it to discharge its duties effectively. I can assure you that she has my personal and professional support in this effort.

PREEMPTION OF STATE AND LOCAL RULES ON HAZARDOUS MATERIALS TRANSPORTATION

Question. Hazardous materials transportation safety continues to be an area of great concern to Congress, states, localities, as well as the transportation community. Particular concern has been raised about the extent to which state and local regulations should be preempted in this area. If confirmed as General Counsel, is there legislation which you would propose to respond to this concern? In working with the states and localities to ensure the safe movement of hazardous materials, how would you view your role?

Answer. I do not have any legislation to propose, nor do I think any is needed, since I understand that the Department's processes for striking the appropriate balance among Federal, State, local, and commercial interests work quite well.

In the past, the General Counsel has played a useful role in giving a second hearing to interests that may not have been adequately considered by a program office. There is in this regard a benefit to being removed from the day-to-day exigencies of running a program, and I would hope to continue to serve this function as appropriate.

AIRBAGS

Question. Secretary Dole recently expressed her belief of the efficacy of airbags in automobiles. As you may know, the General Services Administration has made arrangements to purchase 5000 model year 1985 cars with airbags. If this experiment with airbags proves successful in significantly reducing the number of injuries and deaths in vehicle crashes, would you support reinstatement of Federal Motor Vehicle Safety Standard 208?

Answer. Since the decision of the National Highway Traffic Safety Administration on Federal Motor Vehicle Safety Standard 208 is now before the Supreme Court, I do not believe that it would be appropriate for me to comment in detail. I do support the position the United States has taken in that litigation.

I know that Secretary Dole feels that airbags should be available to consumers if they wish. One way that the Department is working to help decrease the cost of airbags is to join with the General Services Administration to purchase 5000 model year 1985 cars with airbags. The Department hopes that this purchase will help decrease the unit cost of the airbags and increase consumer acceptance. I also support the Department's efforts to increase the voluntary use of seatbelts.

TRANSFER OF CAB INTERNATIONAL FUNCTION TO DOT

Question. As enacted by Congress, the Airline Deregulation Act provides for the transfer of international route determinations from the Civil Aeronautics Board to the Department of Transportation. Do you feel DOT is the appropriate location for this responsibility? If so, why? What role do you think the General Counsel should play in this transfer?

Answer. Yes, I do feel that DOT is the appropriate agency to assume the responsibility of selecting U.S. carriers to serve international routes. The primary goal in route cases is to provide the public with the best possible service on the routes in question. A necessary corollary to this is that competing carrier applicants and other interested parties have a fair and impartial forum in which to make their cases and in which determinations are made solely on the merits. DOT can assure both through an open process and through clear, on-the-record decision-making by an experienced career staff.

I believe that it is the role of the General Counsel to ensure that the procedures adopted by the Department for its administration of the CAB's residual aviation functions following sunset are characterized by fairness, objectivity, and accountability, in keeping with applicable statutory requirements. Particularly during the period immediately following sunset, it will be essential that the General Counsel monitor closely the conduct of the newly assumed functions to ensure that the intention of Congress, as reflected in the Federal Aviation Act and other applicable laws, is properly carried out.

MARITIME PROMOTIONAL PROGRAM

Question. What is your position on the five elements of the maritime policy recently submitted by the Department? What effects will each of these elements have on the development and maintenance of a vital American maritime industry? How will each element specifically affect: (1) employment in the maritime industry; (2) American maritime competitiveness; and (3) national defense capabilities? What is the single most important reason for maintaining a strong American merchant marine fleet, in your opinion?

Answer. I support the provisions contained in the "Merchant Marine Act of 1983," which was transmitted to Congress by Secretary Dole on April 8, 1983. Those provisions include: (1) extension of the authority for subsidized U.S. flag operators to build or buy foreign vessels and still be eligible to receive Operating Differential Subsidy (ODS); (2) immediate cargo preference eligibility for all reflagged vessels under five years of age, and select vessels between five and ten years of age if they are determined useful to the national defense; (3) encouragement of increased foreign investment in U.S.-flag shipping from 49 percent to 75 percent; (4) authority for U.S.-flag operators to use tax deferred Capital Construction Funds (CCF) in connection with the purchase and operation of foreign-built vessels; and (5) repeal of the 50 percent ad valorem tax on non-emergency repairs made in foreign shipyards.

All five of these provisions will work together to enhance the development and competitiveness of the U.S. merchant marine. They will allow U.S.-flag operators to use foreign-built vessels to replace overaged vessels, thus averting a decline in the size of the U.S.-flag liner fleet, which is the primary U.S. source of military sealift capability.

This revitalization and expansion of the U.S.-fleet will require substantial capital investment. The draft legislation responds to that need by relaxing citizenship requirements to provide additional potential sources of foreign capital for investment in U.S.-flag shipping, and by allowing both subsidized and non-subsidized U.S.-flag operators to use funds from their CCF's to build and purchase foreign-built vessels. This change is a logical consequence of allowing subsidized operators to operate foreign-built vessels. Finally, the repeal of the tariff on foreign ship repairs will improve the competitiveness of our merchant fleet by giving them more flexibility and removing the interruption of service and loss of operating revenues that exist under current law.

I believe that with all these provisions working together, the American maritime industry will be more competitive, with a larger number of ships that are more modern and efficient, and with more jobs and higher employment in the maritime industry. All of these improvements will increase our national defense capability, which is, I believe, the single most important reason for maintaining a strong American merchant fleet.

FURTHER TRUCKING DEREGULATION

Question. There has been a great deal of informal discussion in recent weeks on the administration's proposal to further deregulate the trucking industry. What are your views on further deregulation of this industry? To what extent should that legislation contain safeguards for both shippers and carriers?

Answer. A strong competitive motor carrier system is vital to our national economy. The existing regulatory structure does not lend itself to producing such a system. Even through the Motor Carrier Act of 1980 provided significant reform, the system still inhibits market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and small businesses to enter the trucking industry. It adversely affects the shipper and consumer by promoting operational inefficiencies, anticompetitive pricing and by suppressing managerial innovation. Economically, there is little justification for the continued regulation of the trucking industry and the interests of both carriers and shippers would be best served by removing that regulation.

Senator DANFORTH. Mr. Burnley, do you have any statement which you would like to make?

STATEMENT OF JAMES HORACE BURNLEY IV

Mr. BURNLEY. Yes, I do.

Thank you, Mr. Chairman, for providing the opportunity for me to appear today before the committee. I would like, if I could, to recognize my family—my wife, Jane Burnley, and my son, Jay—who are seated right behind me.

I would also particularly like to thank the distinguished senior Senator from North Carolina, my home State, Senator Helms, who will be joining us momentarily to make brief remarks, and also I would like to acknowledge and thank Senator East for his generous support for my nomination.

I am deeply honored that President Reagan has nominated me to serve as General Counsel of the Department of Transportation. I am personally committed to carrying out the policies of his administration and I am particularly delighted to have the opportunity to serve under Secretary Elizabeth Dole.

If I am confirmed, my top priorities as General Counsel will be to provide Secretary Dole and the other senior members of her management team with the best legal counsel possible and provide leadership and guidance for the various legal offices in the Department.

I have always tried to take my professional responsibilities seriously, and I can assure you that I will continue to do so in this important position. In my view, the General Counsel must represent

the interest of his client, the Secretary, while taking care to insure that the laws and the intent of Congress are carried out.

During the past few weeks while I have been at the Department as a special assistant to the Secretary I have been impressed both with the vast scope of the Transportation Department's statutory responsibilities and with the caliber of the staff. I think the Department has made much progress over the past 2 years, but there are still many important issues that we have to address.

I am looking forward to working with Secretary Dole to tackle those problems and to working with the Congress in the months ahead.

I would be happy to respond to any questions you may have.

Senator DANFORTH. Thank you very much, Mr. Burnley. You are, of course, as the position itself indicates, a lawyer. I see you are a graduate of Harvard Law School. Does Harvard have a law school?

Mr. BURNLEY. It did when I was there, sir, some years ago. I must confess I have not been back and checked lately.

Senator DANFORTH. There is your 10th reunion coming up. They will be after you by mail.

Mr. BURNLEY. As long as I send my check in, I think they will excuse me.

Senator DANFORTH. Have you been practicing law since your graduation from law school?

Mr. BURNLEY. Yes, sir. I practiced in Greensboro, N.C., from 1973 until 1981. I came with the administration in early 1981 as Director of the VISTA program. In March 1982, I moved to the Justice Department as a member of the staff of the Deputy Attorney General.

Senator DANFORTH. Have you spoken with the Secretary of Transportation as to what sort of post the General Counsel position is at DOT? Is this a policymaking position, or is a lawyer more or less a hired gun? How do the Secretary and you view your role?

Mr. BURNLEY. I have talked with her at substantial length, both about the general relationship and in the specific of context of this issue. It is very difficult, I think, to segregate one role from the other.

Clearly, as the Department's chief legal officer I have responsibilities as a lawyer and many of those responsibilities are those any general counsel would have in a Cabinet-level department—to see that we give advice on matters great and small to the Secretary and other senior officials of the Department and to see that the statutes and regulations we are responsible for are properly implemented.

I think it is fair to say that I will be asked from time to time for policy advice as well, and I certainly will not hesitate to give her such advice as she requests from me.

Senator DANFORTH. How many lawyers would be working under you?

Mr. BURNLEY. My understanding, Senator, is that we have between 35 and 40 on the General Counsels' staff. However, as you know, the Department has a number of different modes, and spread throughout the Department there are something on the order of 400 to 500 attorneys. Each of those separate administra-

tions or modes has its own Chief Counsel, and I expect to be working very closely with each of them and their respective staffs.

Senator DANFORTH. Do you have responsibility for hiring the lawyers under you, or is that taken care of pretty much for you?

Mr. BURNLEY. I understand, although I have not reviewed all of the delegations specifically on hiring authority, that I do have sign-off authority on the hiring of attorneys in the Department.

Senator DANFORTH. You have?

Mr. BURNLEY. The sign-off authority. It may be more of an oversight responsibility. Certainly I would expect to play a much more direct role with respect to hirings in the General Counsel's office and to work in consultation with the various modes as to the Chief Counsel's offices.

Senator DANFORTH. Do you have any particular view as to what kind of personnel you will look for?

Mr. BURNLEY. Yes, sir, I do. Obviously, you have got to have someone who has demonstrable legal ability. Now that may be someone coming straight out of law school who has done well in law school. It may be someone who has had several years either in private practice or else with the Government. But that comes first.

Second, I think it is extremely important that you have people who do not view themselves as policymakers in line attorney positions. You want the best, most candid guidance and advice, but once policy is set by those who are responsible for policy, then you have got to have a legal staff who will work to see that the policy is implemented.

Senator DANFORTH. Does the General Counsel have the responsibility of determining what is to be litigated and what is not to be litigated insofar as anyone in the Department does? For example, the question of both the passive restraint rule and the bumper standards are now in litigation. Whether or not to press that matter on in litigation or, in effect, to boot it out, would that be your decision or the Secretary's decision? Or would you work together in making those decisions?

Mr. BURNLEY. We would not only work together, Senator, on major suits of that sort, but I think it fair to say, having just spent the last year at the Justice Department, that they will have a good deal of input as well.

As you know, the Justice Department has a quasi-independent role in making decisions about how litigation is handled. My observation has been, having been there and now being at a client department, that they work very closely with the Department on those decisions. But the Justice Department does have the legal authority and from time to time exercises it to overrule a departmental decision on whether litigation will be pressed.

Of course, often we find ourselves in the role of defendant and we are called upon to show up whether we wish to or not, because we have to defend whatever action has been brought.

Senator DANFORTH. Sure. On the other hand, it is possible just to drag on the litigation forever to postpone the inevitable.

Mr. BURNLEY. I do not think that is good public policy. My view is that if you have got litigation where clearly the equities are not in your favor that you ought to look for the best compromise possi-

ble and move along to other matters. I do not view litigation for the sake of litigation as a policy goal. Quite the contrary.

Senator DANFORTH. Is there anything that the committee should know or that the Senate should know in dealing with your confirmation with respect to any possible conflicts of interest that you can think of?

Mr. BURNLEY. No, sir. I have given the Department a letter indicating that there is one matter, a fairly minor matter, of litigation in North Carolina where my firm and I represented some private apartment owners concerning flooding near an interstate interchange. I do not expect that matter to come to my desk, but should it, I am disqualifying myself.

Other than that, I know of nothing else.

Senator DANFORTH. Nothing in particular that we should know of that would reflect on you or the administration, no reason you can think of why you should not be confirmed?

Mr. BURNLEY. No, sir. I do not know of any. I have provided the committee with all of the information it has requested in that regard, and I do not know of any skeletons that have not yet come out of the closet.

Senator DANFORTH. Well, I know of no reason why you should not be confirmed. Your record certainly speaks for itself. It is a fine one and it is nice to see that a graduate of Harvard Law School can make good.

I would drag out the questioning somehow for Senator Helms to get here, but, frankly, I cannot think of anything else to ask you.

Mr. BURNLEY. I am sure, Senator, he would be happy to submit a statement for the record.

Senator DANFORTH. Thank you very much, sir.

Mr. BURNLEY. Thank you very much.

[Whereupon, at 9:17 o'clock a.m., the committee adjourned, to reconvene at 9:30 o'clock a.m., the same day.]

[The following information was subsequently received for the record:]

POSTHEARING QUESTIONS OF THE MINORITY AND THE ANSWERS THERETO

Question 1. During fiscal year 1982, ACTION planned to obligate less for the VISTA program than the $16 million "floor" established by the Omnibus Budget Reconciliation Act of 1981. However, in August 1982, the Comptroller General determined that ACTION could not lawfully reduce VISTA funding below the $16 million level. (a) As the Director of VISTA and Deputy Associate Director of ACTION during much of this time, what was your position on reducing VISTA funding levels? (b) What efforts did you make to obligate the $16 million minimum, particularly prior to the GAO decision?

Answer a. I agreed with the position of the Director of ACTION and the General Counsel of ACTION that the Agency could lawfully reduce VISTA funding below the $16 million level for fiscal year 1982 (See attached copies of memorandum from Arthur Fergenson, General Counsel, to Thomas Pauken, Director of ACTION, dated February 9, 1982, and letters from Mr. Pauken to Congressmen Perkins and Murphy, respectively, dated February 10, 1982). The Omnibus Budget Reconciliation Act, Public Law 97-35, was enacted on August 13, 1981. It contained a "floor" of $16 million for fiscal year 1982. However, on December 15, 1981, Public Law 97-92, a continuing resolution, was enacted, which required a four percent reduction for each appropriation account. It also provided that the budgeted individual programs or projects within an account could be reduced up to six percent.

One of the basic principles of statutory construction is that a later enactment takes precedence over a prior inconsistent law. This is particularly true as to budgetary matters. Since the VISTA program was being phased out (and the "floors" of

$16 million for fiscal year 1982 and $8 million for fiscal year 1983 were consistent with the Administration's publicly announced phase-out plans), I concurred with the Director of ACTION's decision to cut the VISTA budget by six percent, thus avoiding the necessity of cutting other ACTION programs in which the Congress continued to show a strong interest.

b. I made no efforts to obligate the $16 million "minimum", since I believe the Congress had in effect amended the language of Public Law 97-35 when it passed Public Law 97-92. However, when questions were raised by the staff of the House Subcommittee on Select Education, I instructed my staff to preserve the option of restoring the amount cut. I took this step so that the problem could be fully reviewed. As the recent GAO report indicates, this option was successfully preserved, since the six percent cut was restored and expended before the end of the fiscal year.

Question 2. On April 15, 1981, ACTION published, with an immediate effective date, revised VISTA guidelines establishing criteria for funding projects. In October 1981, the Federal District Court in eastern Pennsylvania ruled that these unlawfully promulgated guidelines could not be used in denying renewal funding for an existing VISTA project. (a) What was the rationale for not allowing the appropriate comment period before these regulations became effective? (b) During the period of time from April 15, 1981 to February 1982, when the new rules became effective, what standards were used in evaluating funding proposals? (c) Were the same standards applied nationwide during this time, including those proposals made in the eastern Pennsylvania area? (d) Were any proposals denied during the April–October 1981 time period re-considered after the new regulations had been properly issued?

Answer a. My view at the time of issuance of the April 15, 1981, VISTA Guidance Papers was that no comment period was required, because no new mandatory elements were being required in VISTA applications. All mandatory criteria included in that document had already been set out by the VISTA Guidance Papers published by the prior Administration on September 10, 1979. The only change in substantive criteria was the deletion of the requirement that all VISTA projects had to emphasize community organizing.

At the time this document was published, ACTION's career Deputy General Counsel was the Acting General Counsel, and I relied upon his advice and that of his staff. I believed then, and I continue to believe, that their advice was correct. In fact, a federal district court in Texas had refused to issue a temporary restraining order or preliminary injunction when requested to do so on grounds very similar to those asserted in the case in Pennsylvania.

In the Pennsylvania decision, Judge Pollack noted that the "agency fault" was "obviously not a malicious one, but simply a misanticipation of what a beknighted judge would think." Judge Pollack also commented on the manner in which I responded to his informal request that funding of the plaintiff project be continued during his consideration of the case:

"Mr. Burnley has done that. It is something which seems to me a highly commendable administrative practice . . . My limited point here is that I think it only proper for me to express the Court's gratitude for what seems to me a very responsible way in which Mr. Burnley, at the instance of Mr. Grossman, and I'm sure with Mr. Fergenson's acquiescence, has responded."

b. The decision by the District Court in the Eastern District of Pennsylvania was rendered in an opinion from the bench on October 3, 1981, vacating my decision to deny the renewal application of the Tenant Action Group and remanding the matter to me for further appropriate action. Thus, between April 15 and October 3, 1981, the standards set out in the April 15 VISTA Guidance Papers were applied nationally. Between October 3, 1981, and February 18, 1982, the April 15 VISTA Guidance Papers applied everywhere except the Eastern District of Pennsylvania. In the latter area, the 1979 Guidance Papers were in force. As noted above, the sole substantive difference between the 1979 and 1981 Guidance Papers was the community organizing element set out in the former.

The only reason for immediately going through the republishing process after the October 3, 1981 decision was the consensus advice of the ACTION and Department of Justice attorneys involved in the case that this would be a speedier way of solving the problem in eastern Pennsylvania than appealing to the U.S. Court of Appeals.

In addition to the plaintiff in the Pennsylvania case, VISTA agreed to review again two other projects which had been denied renewal prior to October 3, 1981. Both reviews were agreed to as a way of settling pending litigation. Although the letters agreeing to further review were signed by my successor as Director a few days after I moved to the Department of Justice, I participated and concurred in the decisions to offer further review prior to my departure.

Question 3. On September 4, 1981, the Director of VISTA sent a memo to the Regional Directors with a standard form letter to be used in notifying applicants with projects three years old of their denial of funding renewal. The GAO has determined that this led to some misunderstanding by the Regional Directors, who interpreted the memo as guidance to deny funding for *all* projects three years old. In January 1983, the new VISTA Director clairfied this by stating that because a project is three years old is not sufficient justification for denying funding renewals. (a) As one of the primary administrators of the VISTA program, how did you follow-up on the implementation of the September 4 letter? (b) What information caused the 1983 letter of clarification to be sent and why did it take over a year for such guidance?

Answer a–b. I am attaching a copy of a memo dated March 22, 1983, from Dixie Cassell to Ron Famous, GAO Auditor, which sets out the circumstances surrounding the "three-year" rule. Ms. Cassell served as my special assistant while I was Director of VISTA, and she continued in that position under my successor. She reviewed the information therein with me prior to sending the memo, and I believe it to be correct.

The assumption underlying question 3(b) is incorrect. As the Cassell memo spells out, ACTION published a new regulation abolishing the three-year rule. This regulation was published in its final form on February 8, 1982, and became effective on March 25, 1982. I was intimately involved in its preparation. One of the changes made between the version published for comment on August 31, 1981, and the final regulation was the abolition of the three-year rule, which had been imposed in 1978 by the prior Administration. Copies of the final regulation and of my memo of September 4, 1981, are attached.

Thus, it did not take "over a year" for guidance to be sent to Regional Directors. The recent GAO report completely ignored the fact that the three-year rule was abolished as of March 25, 1982. Copies of the final regulation were distributed to all Regional Directors prior to its effective date. I do not know why a further memo mentioned this issue in January, 1983, since I left VISTA ten months earlier.

Question 4. You have publicly stated that you thought VISTA's program activities were inappropriate for the federal government. Specifically, you expressed a concern that "VISTA's mission is too broadly defined in the authorizing legislation." What efforts did you, as Director of VISTA and Deputy Associate Director of ACTION, do to change this legislation to better fit the needs of the agency?

Answer. I did not seek additional legislative changes to govern the VISTA program. I concluded during my tenure as Director that the concept of the program had so many defects that it was simply not workable. For example, the Congress had specifically applied Hatch Act restrictions to VISTA Volunteers in section 415(b) of the Domestic Volunteer Service Act of 1973, as amended. Section 403 (a) and (b) of the Act set out further restrictions on lobbying and electoral activities even tighter than those of the Hatch Act. Yet without taking the extreme step of having an ACTION employee closely monitoring the daily activities of each Volunteer, enforcement was impossible. Another problem was the attrition rate of (40 percent of the Volunteers resigned before completing a year of service), which had been fairly constant since the early years of the program.

I did take numerous administrative steps designed to improve the operation of the program while simultaneously planning for an orderly phase-out. I also worked with other senior officials of ACTION and Members of Congress to explore alternative ideas which held promise in meeting some of the needs VISTA tried, and largely failed, to address.

Question 5. DOT comments inserted into a final draft of a recent Airport Access Task Force report indicate it is against giving the Federal Aviation Administration (FAA) "authority to pre-empt state and local actions to deal with airport noise," a position that puts it in direct conflict with current FAA policy. In a letter to the Task Force Chairman Dan McKinnon, Secretary Dole included dissenting comments indicating DOT's rejection of the notion that the FAA has "latent pre-emptive authority which can be tapped without statutory change" and that a system of national standards while more efficient from the air carriers' viewpoint, "could result in an individual community having more or less noise than it would otherwise tolerate." It is our understanding that the FAA is currently litigating against local authorities on noise issues, and is claiming pre-emptive authority. Could you comment on this apparent conflict, as well as provide your own perspective regarding federal intervention in local noise abatement efforts?

Answer. I do not believe a conflict exists. The Federal Aviation Administration has always been prepared to litigate against unreasonable airport proprietor noise abatement measures on the basis of the existing Constitutional prohibitions on dis-

criminating unjustly or imposing an undue burden on interstate commerce. The power to strike down such regulations is in the courts. The FAA is now involved in only two active cases of this sort, both concerning absolute curfews that the FAA believes are not adequately justified.

The Airport Access Task Force was proposing a far-reaching regulatory program that could have involved the FAA in the operations of most major airports. The belief that this could not be accomplished without legislation is the basis of the Secretary's comments on "latent pre-emptive authority."

The Secretary supports longstanding DOT/FAA policy that airport authorities, which are legally responsible for aircraft noise impacts, are in the best position to balance local commercial needs against environmental and land use questions in establishing use restrictions.

I agree that the federal government should not as a general rule attempt to intervene in matters essentially local in nature on behalf of a particular industry. Of course if local regulation began to seriously threaten the viability of the national air traffic system and remedies available under current law were not sufficient, the Department of Transportation should consider proposing legislation to deal with the situation.

ACTION
WASHINGTON, D.C. 20525

OFFICE OF
THE DIRECTOR

February 10, 1982

Honorable Carl D. Perkins
Chairman
Committee on Education and Labor
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This will respond to your letter of February 1, 1982, making further inquiry with respect to the reductions made in programs authorized by title I of the Domestic Volunteer Service Act of 1973 as a result of the requirements contained in the currently applicable continuing resolution, P.L. 97-92.

As your letter correctly states, funds for the VISTA program authorized by part A of title I of the Act were reduced by six percent, from $16,000,000 to $15,040,000, notwithstanding the provisions of Section 607 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, placing a $16,000,000 floor under the VISTA program.

We took this action only after careful consideration of both P.L. 97-35 and P.L. 97-92 led us to conclude that P.L. 97-92 intended to impose additional budget cuts on all discretionary programs contained in the Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act unless specifically exempted from reduction by P.L. 97-92, notwithstanding any floor that might be contained in previous authorizing legislation.

If the VISTA program had been exempted from such reductions, as you suggest, it would not have been possible for us to comply with the requirement contained in Section 142(e) of P.L. 97-92 that no project or program be reduced by more than six percent, because programs authorized by parts B and C of title I would have had to absorb a reduction greater than six percent. Since reconciliation is impossible, the rule of law is clear that the later enactment, P.L. 97-92, is controlling. Had the Congressional Research Service had these additional facts, we believe their conclusion would have been the same as ours.

Enclosed is a copy of an opinion prepared by the ACTION General Counsel which explains the legal reasons for our decision in greater detail.

Sincerely,

Thomas W. Pauken

Thomas W. Pauken
Director

BEST COPY AVAILABLE

ACTION

WASHINGTON, D.C. 20525

February 9, 1982

MEMORANDUM

To: Thomas W. Pauken
Director

From: Arthur F. Fergenson
General Counsel

Subject: VISTA Program Funding under Public Law 97-92, Continuing Appropriations 1982

You have asked us to review and comment on an opinion provided to Chairman Carl Perkins of the Committee on Education and Labor of the U. S. House of Representatives and Select Education Subcommittee Chairman Austin J. Murphy by the Congressional Research Service which concludes that if less than $16,000,000 is available in fiscal year 1982 for programs under title I of the Domestic Volunteer Service Act of 1973, the entire amount must be made available to VISTA. The opinion also concludes that if more than $16,000,000 is available for programs under title I, the first $16,000,000 must be made available to support the VISTA programs.

For the reasons stated below, it is my view that this opinion is an error, and that ACTION is authorized to reduce the VISTA budget by up to six percent of the $16,000,000 earmark contained in the Omnibus Budget Reconciliation Act, P.L. 97-35. Indeed, failure to reduce the VISTA budget below $16,000,000 would be unlawful.

Section 607(a) of the Omnibus Budget Reconciliation Act amended Section 501 of the Domestic Volunteer Service Act of 1973 (42 U.S.C. §5081) to read as follows:

> "There is authorized to be appropriated to carry out title I of this Act $25,763,000 for fiscal year 1982 and $15,391,000 for fiscal year 1983. Of the amounts appropriated under this Section, not less than $16,000,000 shall first be available for carrying out part A of title I for fiscal year 1982, and not less than $8,000,000 shall first be available for carrying out part A of title I for fiscal year 1983."

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As correctly noted in the Congressional Research Service opinion, the effect of this provision is to put a "floor" under the VISTA program authorized by part A of title I of the Domestic Volunteer Service Act of $16,000,000 for fiscal year 1982, and $8,000,000 for fiscal year 1983.

Funds to support programs under the Domestic Volunteer Service Act for fiscal year 1982 were appropriated as part of P.L. 97-92, the continuing resolution enacted December 15, 1981. Section 101 of the continuing resolution authorized expenditure of sums for programs authorized by the Domestic Volunteer Service Act at the rate contained in the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act (H.R. 4560) as reported by the Senate Commitee on Appropriations to the Senate on November 9, 1981. The amount appropriated for title I of the Act by the Senate version of H.R. 4560 was $19.6 million, of which $16 million was designated for VISTA, as required by the earmarking provisions of P.L. 97-35, $1.830 million was designated for Part B Service Learning Programs, and $1.884 million was designated for Part C Special and Demonstation volunteer programs.

The Congress, however, voted additional cuts in appropriations in section 142 of P.L. 97-92. These provisions, as they affect ACTION provide:

> "Sec. 142(a). Notwithstanding any other provision of this joint resolution, and except as otherwise provided in this section, total budget authority provided by this joint resolution for appropriation accounts for which provision would be made in the following Appropriation Acts:
>
> * * *
>
> the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1982
>
> * * *
>
> shall be reduced by 4 percentum...
>
> (c) The reductions made by subsections (a) and (b) shall be applied proportionally to each appropriation account...

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* * *

(e) The reduction made by this section shall be applied so that the budget authority provided in this joint resolution within any appropriation account for any program or project shall not be reduced by more than 6 percentum.

(f) The reduction made by this section shall be applied so that no program or project shall be terminated....

* * *

(h) This section shall not apply to any appropriation account, program or project for which budget authority is provided by a 1982 appropriation Act enacted into law subsequent to the enactment of this joint resolution."

It is worth noting that the subsections omitted above contain a substantial number of exceptions to the general reduction, showing clearly that the Congress knew which activities it wished to exempt from the general budget cut.

Representative Silvio Conte, the proposer of the resolution ultimately adopted, said:

"This resolution provides that the Labor, Health and Human Services, and Education programs be funded at a rate which is the lower of the House-passed or the Senate reported Labor HHS-Education bills...

Then, to this basic rate we have made certain exceptions for key human service, edcuation, and health programs that we believe are particularly critical to this Nation...

[T]he real point is that to the basic rate we made some adjustments in these very vital health and human service programs to make sure that their funding levels would preserve them as effective, productive programs: House $454; Senate $344; total add-ons $788.

Then this resolution applies a 4 percent reduction to virtually every discretionary account..." Cong. Record (daily ed.) Dec. 10, 1981, H9109

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> "The language of the substitute is clear... my intent is a 4 percent cut in an account, with no more than 6 percent in any project or program within an account." Ibid, H9116

The elements of Mr. Conte's appropriation bill may be summarized as follows:

1. An overall 4 percent cut in each appropriation account. ACTION's domestic programs all fall within one account.

2. Discretion given to the Administration to reduce any program or project within an account by not more than 6 percent, within the overall 4 percent limit.

3. No project or program to be terminated as a result of the cut.

4. An opportunity for the Congress, when it considers individual appropriation Acts, to restore cuts made by the continuing resolution.

There is nothing in the continuing resolution, or in its history to indicate that VISTA was to be exempted from these provisions.

Mr. Natter of the Congressional Research Service has quoted from "Statutes and Statutory Construction," a leading work in the field:

> "In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.
>
> * * *
>
> ...But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature." Sands, Statutes and Statutory Construction, §51.02 (Fourth Ed., 1974).

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In my opinion, there is an irreconcilable conflict between section 607 of P.L. 97-35 and section 142 of P.L. 97-92, and the latter enactment must prevail. The House of Representatives debates on P.L. 97-92 quoted above show that the proposer of the legislation eventually adopted (Mr. Conte) went into considerable detail in describing exceptions to the basic 4 percent reduction rule for what he described as "very vital health and human service programs." There is, however, no mention anywhere in the debate of VISTA or other ACTION programs. There is no doubt that the Congress intended P.L. 97-92, including the budget cut provisions, to apply to ACTION and its programs. If previous enactments are in conflict with P.L. 97-92, they must yield to it.

The CRS opinion states that there is no irreconcilable conflict, and that both P.L. 97-35 and P.L. 97-92 can be reconciled. This is clearly not so. The CRS opinion does not consider the impact of such a conclusion on ACTION programs other than VISTA. The total appropriation for all of title I of the Domestic Volunteer Service Act, prior to making the cuts required by P.L. 97-92, was $19.714 million. A four percent cut in this amount requires a reduction of $788,560. If, as the CRS opinion suggests, this sum should be taken first from part B and part C programs, the resulting reduction in programs and projects authorized by those parts of title I would obviously be far in excess of the six percent reduction which is the maximum authorized by P.L. 97-92, since the total appropriation for these programs was only $2.714 million. It is therefore impossible to comply with both P.L. 97-35, as interpreted by CRS, and with the plain language of section 142 of P.L. 97-92, which prohibits a reduction in any program or project of more than six percent.

Since P.L. 97-92 supersedes the "floor" for VISTA contained in section 607 of P.L. 97-35, it also seems clear that section 142 of P.L. 97-92 should be applied in its entirety, and that the Director of ACTION is vested with authority to determine how much of a reduction, up to a maximum of six percent, should be made in the VISTA program in the overall interest of the Agency. Representative Conte's proposal for budget cuts was a single, integral scheme which had as an essential element limited agency discretion. (See Congressional Record, December 10, 1981, H9108 (daily ed.))

For the reasons stated above, it is my opinion that you, as Director of ACTION, are required to reduce the overall level of obligations by the Agency by four percent, and that section 142 of P.L. 97-92 authorizes you, notwithstanding section 607 of P.L. 97-35 to reduce the level of obligations for the VISTA program by not more than six percent.

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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON SELECT EDUCATION
617 HOUSE OFFICE BUILDING ANNEX #1
WASHINGTON, D.C. 20515

February 1, 1982

Mr. Thomas Pauken
Director - ACTION Agency
806 Connecticut Avenue, N.W.
Washington, D.C. 20525

Dear Mr. Pauken:

Thank you for responding to the questions submitted to ACTION on November 17, 1981. We appreciate the effort made to inform this Committee.

We are quite concerned, however, by the response to question number 16, which states: At the present funding level of $15,040,000 ACTION would train and place approximately 2235 VISTA volunteers.

As you know, the statutory language contained in P.L. 97-35, which authorizes funding for the Domestic Volunteer Service Act through fiscal year 1983, places a funding floor under part A of title I. The floor is $16 million for fiscal year 1982 and $8 million for fiscal year 1983. It appears that the $15,040,000 is calculated from a provision of the current Continuing Resolution which permits reduction of programs within an appropriations account by six percent. However, there is no authority contained in the Continuing Resolution which would permit the reduction of a funding floor where such reduction is not made necessary by the required four percent reduction in an appropriations account. Thus, a reduction of the $16,000,000 floor is a clear violation of the statute. A question put to the American Law Division of the Library of Congress confirms this conclusion. We have enclosed a copy of the American Law Division response.

We shall appreciate your prompt adjustment of the budget for VISTA to reflect the statutory mandate.

Very truly yours,

Carl D. Perkins
Chairman
Committee on Education
and Labor

Austin J. Murphy
Chairman
Subcommittee on
Select Education

CDP/AJM:jwr
cc: Honorable William Natcher
Enclosure

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Congressional Research Service
The Library of Congre

Washington, D.C. 20540

January 21, 1982

FROM : American Law Division

SUBJECT: VISTA Program Funding Under Public Law 97-92, Continuing Appropriations, 1982

This memorandum is in response to your request for a written opinion regarding funding levels for the VISTA program. In particular, you asked whether or not the provisions of the Continuing Resolution enacted on December 15, 1981, Public Law 97-92, override contrary provisions contained in the Omnibus Budget Reconciliation Act, Public Law 97-35, enacted into law on August 13, 1981.

The provisions in question in the Reconciliation Act may be found at section 607. This section states that with respect to the Domestic Volunteer Service Act of 1973:

> There is authorized to be appropriated to carry out title I of this Act $25,763,000 for fiscal year 1982 and $15,391,000 for fiscal year 1983. Of the amounts appropriated under this section, not less than $16,000,000 shall first be available for carrying out Part A of title I for fiscal year 1982, and not less than $8,000,000 shall first be available for carrying out Part A of title I for fiscal year 1983.
>
> * * *

Thus, the Reconciliation Act appears to put a "floor" under Part A of Title I of the Domestic Volunteer Service Act of $16,000,000 for fiscal year 1982 and $8,000,000 for fiscal year 1983.

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On the other hand, section 142 of the Continuing Resolution provides that "... total budget authority provided by this joint resolution for appropriation accounts for which provision would be made in ... the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1982, ... shall be reduced by 4 per centum."

Your question, as we understand it, is whether or not this 4 percent reduction in appropriated funds acts to negate the "floor" spending provisions contained in the Reconciliation Act.

A well established maxim of statutory interpretation provides that a later statutory enactment takes precedence over a prior inconsistent law passed by a body of equal rank, if it is not possible to construe them together. The policy behind this maxim has been concisely explained by Professor C. Dallas Sands in his work entitled "Statutes and Statutory Construction":[1/]

> In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.
>
> * * *
>
> . . .But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature.

1/ C. Sands, Sutherland Statutes and Statutory Construction § 51.04 (4th ed. 1974).

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In the instant case, there does not appear to be an irreconcilable conflict between the two statutes. The Reconciliation Act provides authorization for appropriations, but does not actually appropriate any funds. It then provides that of the amounts appropriated, not less than $16,000,000 shall first be available for carrying out Part A in fiscal year 1982, and not less than $8,000,000 shall first be available for carrying out Part A in fiscal year 1983. It does not mandate that at least $16,000,000 must be appropriated for fiscal year 1982, or that $8,000,000 must be appropriated in fiscal year 1983. It merely states that of the money which is appropriated, it first must be available for Part A in each fiscal year, until certain floor levels are reached. Thus, if less than $16,000,000 is available in fiscal year 1982, after the 4 percent reduction mandated by the continuing resolution, all of those funds must be spent in accordance with the Reconciliation Act, which directs that it be available for carrying out Part A. If more than $16,000,000 is available, then at least $16,000,000 must be available for carrying out Part A.

We hope that this information will be of assistance to you. Please feel free to contact our offices in the future.

Raymond Natter
Legislative Attorney

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NATIONAL GRANT: COALITION OF INDIAN-CONTROLLED SCHOOL BOARDS
DENVER, COLORADO

NATIONAL VISTA GRANT INITIALLY FUNDED IN FY '79 FOR $243,224, RENEWED IN FY 1981 FOR $223,782.

- GRANT WAS TERMINATED BY ACTION, WITH NO SPONSOR APPEAL, ON 5/22/81 FOR MISUSE OF APPROXIMATELY $55,000 OF FEDERAL FUNDS. OTHER FEDERAL AGENCIES, INCLUDING HHS, HAVE BEEN INVESTIGATING ORGANIZATION FOR SIMILAR REASONS.

- $91,045 IN FY 1981 FUNDS WAS DEOBLIGATED UPON GRANT'S TERMINATION.

THREE PROJECT COMPONENTS:

- PAPAGO TRIBE, ARIZONA
- KEWEENAW BAY TRIBE, MICHIGAN
- LUMMI TRIBE, WASHINGTON

WERE CONVERTED TO "STANDARD" VISTA PROJECTS WITH VOLUNTEERS COMPLETING SERVICE; ALL PROJECTS NOW CLOSED.

- ALL OTHER VOLUNTEERS WERE ALLOWED TO COMPLETE MINIMAL TIME REMAINING IN ADMINISTRATIVE HOLD STATUS.

TM
2/3/82
B/c/2/71
VISTA 8/7

VISTA/OAVP Joint Programming & Senior Citizens

VISTA/OAVP coordinate programming in:

- Energy conservation
- Education
- Housing assistance
- Counseling to seniors on fixed or no income
- Tax counseling
- Assistance to developmentally disabled persons

More than 50 VISTAs from 25 projects involved in common programming efforts with OAVP volunteers. (December 1981)

Additionally, nearly 250 VISTAs were assigned to approximately 60 VISTA senior projects other than those jointly supported.

Seniors as clients

- Legislation requires VISTA to encourage "fullest participation of older persons and older person membership groups both as Volunteers and participant agencies..."

Seniors as Volunteers

- 14% of Volunteers are 60+ years; 43 persons are over 7 (December 1981)

Examples

- 8 VISTAs assigned to Michigan Energy Administration working with area agencies on aging and RSVP Volunteer coordinating energy audits, weatherization, and conservation efforts.
- 2 VISTAs assigned to Prescott Neighborhood Assn., Kansas City, Kansas are working with both youth and seniors to improve homes and gardens of over 500 low-income elderly, e.g. home repairs, weatherization, etc. Youth also learn job skills from this effort.
- In addition to its programming efforts, VISTA has linked with OAVP in sponsoring 2 White House Mini-conferences on Aging.

WL
2/3/82
B/c/4/36
VISTA 5/8

VISTA/RURAL PROJECTS

° In December, 1981, 477 volunteers worked on 156 projects in rural areas

  ° Expanding agricultural & producer co-ops
  ° Rehabilitation or construction of housing
  ° Extending health programs to isolated areas
  ° Increasing transportation & other services available to seniors in rural areas.
  ° Winterization of homes

° Joint Efforts
  ° CSA/USAD/VISTA providing technical assistance to 16 selected small farm assistance projects ranging from

    ° a water conservation effort for Indian farmers in Mineral County, Nevada to

    ° a cooperative to help farmers in four counties in Maine market and store vegetables.

  ° Homemakers Organized for More Employment (HOME) Maine VISTAs are

    ° helping to establish a self-help cooperative in this community of farms

    ° assisting in the development of a local crafts industry to provide additional income for subsistence farm families.

Western Idaho Community Action Council, Fayette, ID

  2 Volunteers
  ° Distribution of produce gleaned from fields after harvest to low-income people

  ° Development of farmer's market cooperative.

Mulberry Friendship Center, Williamsburg, KY

  4 Volunteers

  ° Development of community food pantry, surplus food store, woodshop business and mountain crafts co-op.

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WL
2/3/82
B/c/1/50
VISTA 8/9

VISTA/NATIVE AMERICANS

- As of 12/30/81:
  - 11 Native American projects nationwide
  - 34 Volunteers
- Activities:
  - Drug and alcohol abuse prevention/counseling
  - Housing rehabilitation
  - Tribal health and education programs

Examples

- Numan Kitlutsisti, Alaska
  - 6 Volunteers
  - 57 villages included in project areas
  - Activities:
    - Wildlife management
    - Resource Development
    - Service delivery
    - Herring fisheries
    - Coastal zone management
    - Hunting/fishing regulations
- Upper Midwest American Indian Center, Minneapolis, Minnesota
  - 1 Volunteer
  - Activities:
    - Assist in development of Indian wing on existing nursing home facility.
    - Develop foster care program relative to Indian Child Welfare Act
- Small Tribes Organization of Western Washington, Sumner
  - 7 Volunteers
  - Activities
    - Youth alcoholism prevention and education services
    - Nutrition education program
    - Self-sufficient community garden and green house program
    - Vocational counseling and cultural preservation programs

TM
1/27/82
B/c/1/52/3
VISTA 820

VISTA AND FOOD BANKS

- SECOND HARVEST:
  - NATIONAL SURPLUS FOOD CLEARING HOUSE
  - SOLICTS FOOD FROM MAJOR PROCESSORS AND BROKERS
  - ARRANGES FOR DISTRIBUTION TO MEMBER FOOD BANKS
- FOOD BANKS, IN TURN, DISTRIBUTE FOOD TO LOCAL COMMUNITY GROUPS OF THE POOR.
- FY 1982 VISTA IN SECOND HARVEST PROJECT:
  - APPROXIMATELY 100 VOLUNTEERS
  - BETWEEN 35 AND 40 AFFILIATED FOOD BANKS
- VISTAS WILL:
  - PROVIDE OUTREACH FOR FOOD BANKS TO INFORM AND RECRUIT OTHER COMMUNITY GROUPS;
  - MONITOR DISTRIBUTION OF FOOD TO RECIPIENT AGENCIES
  - ASSIST IN ADMINISTRATIVE FUNCTIONING OF FOOD BANKS
- EXAMPLES OF FOOD BANKS APPLYING FOR VISTAS:
  - INTERAGENCY FOOD BANK/ORGON FOOD SHARE, PORTLAND
  - MOUNTAINEER FOOD BANK, GASSAWAY, WVA
  - PITTSBURGH COMMUNITY FOOD BANK

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ACTION
WASHINGTON, D.C. 20525

March 22, 1983

TO : Ron Famous, GAO Auditor

FROM : Dixie Cassell
Special Assistant to Constance Horner

SUBJECT: Letter of Denial Concerning "Three Year Rule"

This is to answer your questions concerning the wording of the sample denial of refunding letter for projects three years of age or more. Jim Burnley, then Director of VISTA, included this letter in a memo to the Regional Directors on September 4, 1981. This memorandum (Follow-up Memo #2 - VISTA Project Reviews) was sent as a follow-up to a conference call with the Regional Directors and was "intended to clarify some inconsistencies which appear to have emerged in our procedures".

Your primary concern is that the letter seems to imply that the project is being denied because it is three years old. This was not the intent of the letter. Rather, the purpose of the letter was to notify the sponsor that the project was not being refunded and to specify the effective date. The letter constitutes a final decision and does not offer a reason for denial because, as was the policy at that time, the anticipated period of project funding at the time of the initial award was three years. Therefore, there was no expectancy of continuation beyond that time on the part of either party. Since April of 1978, the policy was that projects over three years of age which applied for continuation no longer receive special consideration through the denial of refunding procedures, but "will be compared against other new applicatons received". (Federal Register; Vol. 43; No. 48;March 10, 1978).

It should be noted that many VISTA projects are continued beyond three years. It has never been a policy or a practice to deny a project because is has received funds for three years or more. To my knowledge, the September 4, 1981, memo was the only guidance sent to the field on this subject until the new policy of granting appeal rights became effective March 25, 1982. However, between the dates of publication of the new policy and the effective date, field personnel were advised via telephone that projects of more then three years be granted informal meetings.

Please refer to the following Federal Register publications for a complete policy statement and history of the three year rule.

Federal Register; Vol. 43; No. 48; March 10, 1978; pg. 9833
Federal Register; Vol. 44; No. 176; September 10, 1978, pg. 52703
Federal Register; Vol. 46; No. 168; August 31, 1981; pg. 43707
Federal Register; Vol. 47; No. 26; February 8, 1982; pg. 5718

VISTA
806 CONNECTICUT AVE. N.W.
WASHINGTON, D.C. 20525

MEMORANDUM

SEP 4 1981

TO : ACTION Regional Directors

THROUGH: Lawrence Davenport, Associate Director for Domestic and Anti-Poverty Operations

FROM : Jim Burnley, Director of VISTA

SUBJECT: Follow-Up Memo #2 - VISTA Project Reviews

As indicated in our conference call of August 25, 1981, the following procedures serve as a follow-up to my memos of April 22 and June 1, 1981 and focus particularly on VISTA project denial and appeal procedures.

This memo is intended to clarify some inconsistencies which appear to have emerged in our procedures and to minimize some of the attendant paperwork.

I. Tentative Denial at Regional Level

All tentative denial decisions made prior to submission of a project's application to the Director of VISTA will be issued by the the ACTION Regional Director. This procedure will be followed even if the denial is based upon a State Director's recommendation. Note that this is simply a change in who signs the denial letter and is not intended to give Regional Directors the power to reverse a denial by a State Director.

The tentative denial notice should be sent to the sponsor as far in advance of the expiration of the current Memorandum of Agreement as possible. It must contain the reasons for the tentative decision to which the sponsor can address itself if it wishes to make a presentation, and notify the sponsor of the date by which it must request an informal meeting. It should also include a copy of 45 CFR Part 1206, Subpart B as an attachment.

Any questions concerning reasons for denial or language should be cleared with my office prior to issuing the letters. Please forward copies of all tentative denial letters to my office upon issuance.

The Regional Director shall conduct the informal meeting if one is required by 45 CFR Part 1206 2-4(d) (see Sections II and III below for cases where no meeting is required) with the State Director in attendance if feasible. Meetings should be scheduled approximately two weeks after issuing the tentative denial assuming that the sponsor has requested the meeting in a

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timely manner in accordance with the instructions contained in the letter.

At the meeting the Regional Director should collect all information furnished by the sponsor and should indicate only that that material, along with the renewal project file and the Regional Director's own recommendations, will be forwarded to the Director of VISTA for a final decision on the project's renewal application. These should be forwarded to my office within five days of the meeting so that a final decision can be made as expeditiously as possible. (See Section V below regarding continuation of assistance during the appeal process.)

If the sponsor does not request an informal meeting, the Regional Director's decision becomes final, as stated in the tentative decision letter.

II. Projects In Existence Three Years or More

VISTA projects which have been in operation three years or longer are not entitled to an informal meeting as decribed in Section I above to show cause why the project should be renewed. If Regional Directors wish to deny VISTA projects which have reached at least the end of their third year, you should issue a denial letter to the sponsor (see Attachment A) which constitutes a final decision. Copies of such denial letters should be forwarded to my office as soon as they are issued.

Please note that third-year, non-appealable denials relate to projects, and not to sponsoring organizations. Organizations which have sponsored VISTA Volunteers for more than three years may have initiated a new project in terms of problem(s) addressed and activities undertaken since they began their VISTA involvement. In such cases, the length of time that the project has had VISTAs assigned is the determining factor.

III. Extension Requests of less than Six Months

Regional Directors may deny requests of project extensions of less than six months without holding an informal denial meeting regardless of the length of time the project has been in operation. In such cases, you should issue a denial letter to the sponsor (see Attachment B) which constitutes a final, non-appealable decision. Copies of these denial letters should be forwarded to my office as soon as they are issued.

Please note that denial of extension requests of six months or more on projects which have been operating less than three years must follow the procedures outlined in Section I above.

IV. Approval of Extensions in lieu of Full Year Renewals

A number of instances have arisen in which ACTION State and/or Regional Directors have recommended approval of project extensions of less than twelve months although the sponsoring organization submitted an application for a full-year renewal. In these cases, denial of refunding procedures as required by 45 CFR 1206.2-4(d) and Section I of this memorandum apply unless the project has been in operation three years or more.

Regional Directors should issue a tentative denial notice for the one-year request as described in Section I above, including in such notice that he/she is, nevertheless, recommending a project extension of a specified number of months to the Director of VISTA. A copy of this letter should be sent to my office upon issuance.

If an informal meeting on the one-year request is held, the Regional Director should collect all material furnished by the sponsor and forward it, along with the renewal project file and the Regional Director's own recommendations, to the Director of VISTA for a final decision on both the sponsor's renewal application and the Regional Director's extension request. The documentation should be sent to my office within five days of the meeting in order to expedite the final decision. (See Section V below regarding continuation of assistance.)

If the sponsor does not request an informal meeting, the Regional Director's decision on the renewal application becomes final as stated in the tentative letter. Only the extension request package, as supported by the Regional Director, should be submitted to the Director of VISTA for final review and decision.

These ACTION-initiated extensions do not fall under the denial of renewal procedures outlined in Section I regardless of their duration. There will be only one meeting which is based on ACTION's denial of the one-year renewal request.

V. Continuation of Assistance during Denial of Renewal Process

If the project period specified in the Memorandum of Agreeement between ACTION and the sponsoring organization expires before a final decision is rendered on the sponsor's renewal or extension application, the project shall be continued at the same level of support until the final decision is made and communicated to the sponsor.

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The M/A should be amended to extend its period "until a final decision is rendered on the project's renewal status"; all volunteers assigned should be continued in "active" status although those volunteers who have reached their scheduled termination dates and wish no additional service will, of course, be able to leave; support grants should be extended per attached opinion from General Counsel (see Attachment C). The extension of the service of volunteers who wish to continue until the final decision is made is subject to the ordinary criteria for extension. Any questions regarding the implementation of such grant extensions should be directed to the ACTION Grants Office.

If a final decision is rendered which denies the project's renewal request, volunteers whose terms of service extend beyond the project's expiration date shall be notified by mailgram from the Regional Director that they have been placed on Administrative Hold effective the day after the project's expiration, shall continue to receive all regular allowances, shall no longer engage in any project-related activities, and shall contact the ACTION State Office within three days to clarify their status.

A follow-up letter should be sent to the volunteer by the State Office as soon as the volunteer notifies the State Office that he/she wishes to be considered for reassignment, or wishes to resign from VISTA. If the State receives no notification, or if no reassignment can be found, the volunteers will be terminated from VISTA service pursuant to volunteer termination procedures contained in 45 CFR 1210.

VI. Timeliness

It should be obvious from the preceding information, as well as from operational experience, that equitable and expeditious treatment for both sponsors and volunteers requires that documentation be submitted and handled at all levels in a timely manner.

All sponsors should be notified by the appropriate State Office that renewal applications should be submitted to the State Office at least 115 days prior to the current M/A expiration date. Packages should be in the Regional Office at least 80 days before expiration date, and into my office at least 60 days before expiration date.

If we all do our part to hold to these time-frames, final decisions will be forthcoming before a project's current program period expires, thus alleviating the need for unnecessary extensions and Administrative Hold periods.

cc: State Directors
A. Fergenson

Attachment A

Dear _____:

This is to notify you of ACTION's decision not to refund your VISTA project, covered by the Memorandum of Agreement between ACTION and your organization, effective ----------. Our records indicate that your project has been funded for at least 3 years and thus, is beyond the original period of project funding anticipated by ACTION at the time of your initial award.

Sincerely,

_____
Regional Director

Attachment B

Dear _____:

This is to inform you that your request for an extension of your VISTA project to ---------- 1981, has been denied.

As a result of this denial, your project will end on ----------, the date on which the Memorandum of Agreement expires.

Sincerely,

_____
Regional Director

ATTACHMENT C

Jim Burnley
Director, VISTA

August 26, 1981

Randi J. Greenwald
Associate General Counsel

Extensions of Grants Facing Denials of Refunding

This is to confirm this office's opinion that a project with an imminent expiration date may be extended for a period not to exceed 30 days when ACTION has decided to issue a denial of refunding notice. The sponsor should be advised that if the decision to deny refunding becomes final prior to the end of the 30-day period, any expenses incurred after the effective date of the decision will be disallowed.

In a situation where the decision does not become effective within the 30 days, another extension for a period not to exceed 30 days may be granted.

When a sponsor has funds remaining in its budget on the expiration date of its original grant, an extension of time only may be made with instructions to use those funds until the denial decision becomes effective or until the end of the 30-day extension, whichever comes first.

If the sponsor has no funds remaining, the Grants Officer should grant the time extension and notify the sponsor that funds will be made available for those expenses incurred prior to the effective date of the denial decision or the end of the 30-day period, whichever comes first.

cc: Kirby McCollum, Chief, Grants Branch

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RJGreenwald:stb:8/26/81

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STATEMENT OF HON. JESSE A. HELMS, U.S. SENATOR FROM NORTH CAROLINA

It gives me great personal pleasure to be here today to introduce to you Jim Burnley and to strongly endorse his nomination by the President as General Counsel of the Department of Transportation.

Jim Burnley is a distinguished attorney from Greensboro, in my state of North Carolina, and for the past two years has served with distinction in a number of important governmental positions.

He will come to this post from the Department of Justice, where he served as Associate Deputy Attorney General of the United States. Before that he served as special assistant to the Deputy Attorney General and as Director of the Vista program.

Jim, in this new position is joining another distinguished North Carolinian, Elizabeth Hanford Dole, whom this committee confirmed as Secretary of Transportation just a few weeks ago. They will make a good team. I know the Secretary thinks very highly of this appointee.

Jim came back to Greensboro in 1973 to enter the practice of law after graduating magna cum laude from Yale University with a degree in political science and from the Harvard University School of Law.

He became active in civic affairs in Greensboro and a leader in the North Carolina Republican Party.

All of us who are in politics know it takes a continuing flow of interested citizens to participate at the grass roots level if our democratic process of government is to remain strong.

Jim Burnley is the type of person who not only is interested in the process of government, but has worked hard in showing this interest. He was recognized as Man of the Year by the North Carolina Federation of Young Republicans in 1977.

During his tenure as Director of Vista, he instituted a series of streamlining actions which resulted in increased economies and operational efficiencies in both the number of programs and in staff personnel. He is a good Administrator, as well as being a fine attorney.

I have known Jim Burnley for some years. I have worked with him and have been impressed with his integrity and character, as well as his ability as an attorney. I commend him to this distinguished committee. He will serve the citizens of this country well in this new post, as he has in other important positions. I will vote for his confirmation with a great deal of pleasure.

STATEMENT OF HON. JOHN P. EAST, U.S. SENATOR FROM NORTH CAROLINA

Thank you, Mr. Chairman.

I would like to join my distinguished colleague, the Senior Senator from North Carolina, in endorsing the nomination of Jim Burnley to be General Counsel of the Department of Transportation.

Jim Burnley has contributed importantly to his community of Greensboro, North Carolina, to his profession of the law, to the Republican Party, and to his government in a series of high level positions.

It is always a pleasure to see a fellow citizen of your state make his mark. It is a double pleasure for me, as I have known and worked with Jim for some years.

With Elizabeth Hanford Dole as Secretary of Transportation and Jim Burnley as General Counsel of DOT, North Carolina will have a distinguished daughter and a distinguished son working together in a vital field for our country and its citizens.

I will vote with extreme pleasure for confirmation of this appointee and I commend him to this committee. He is a fine attorney and administrator and of splendid character. He will serve this government well.

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